

Coordinación a cargo de
Montserrat ABAD CASTELOS
(Derecho Internacional Público)
Inmaculada MARRERO ROCHA
(Relaciones Internacionales)

EL LEGADO DE LA SOCIEDAD DE NACIONES/ *THE LEGACY OF THE LEAGUE OF NATIONS*

THE LEGACY OF THE LEAGUE OF NATIONS: CONTINUITY OR CHANGE?

Nigel D. WHITE *

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1. INTRODUCTION

A legacy is something left by a predecessor to its successor, in this case from the League of Nations to the United Nations (UN). Here «legacy» is understood broadly to mean what aspects of the League have proved foundational to today's international order, but also what aspects have been rejected in the post-1945 world. The drafters of the successor organisation had a choice as to which legacies to accept and which to reject, at least in terms of institutional structures and powers but, it will be argued, less so in terms of the continuity of the international legal order.

2. THE IMPORTANCE OF UNIVERSALITY

The idea of a world organisation focused on peace and security but also having a general competence in socio-economic matters was not lost with the collapse of the League in 1939, the Allies agreeing as early as 1942 on the need for a successor organisation, but it would be an «improvement» on

* Professor of Public International Law, University of Nottingham (United Kingdom). This article is based on the text of a keynote address given at a conference: «The Legacy of the League of Nations», held in the University of Leicester, on 31st January 2019.

the League. For example, the relative ease with which states could withdraw from the League under Article 1(3) of the Covenant led the drafters of the UN Charter not to include a withdrawal clause - it should be hard to withdraw from an international organisation so integral to securing global peace.

The first draft of the Covenant emerging from the drafting Commission in 1919 was described by President Woodrow Wilson as a «living thing» and as a «constitution of peace, not as a League of War»¹. However, he had to return to the Commission in March 1919 to propose pragmatic changes to the draft Covenant in order to try and persuade Congress to support the treaty, changes that included a withdrawal clause, an exclusion of matters within a member state's domestic jurisdiction, and a recognition of regional understandings such as the Monroe Doctrine².

Membership was a serious problem for the League. In addition to the US refusal to join, there is no doubt that withdrawals did not help the League's cause. Between 1924-1940 sixteen states withdrew from the League, including Germany and Japan, weakening its universality and removing barriers preventing the slide towards conflict. In contrast, there has been limited practice of withdrawal in the case of the UN - the Indonesian «withdrawal» from the UN in 1965 was revised to be seen as a hiatus in cooperation a year later. Although there have been some withdrawals from the specialised agencies these have been fairly limited and, at least in some instances, in accordance with constitutional provisions. On the whole, though, it could be argued that the main reason why the UN prevails is that it is a universal organisation, providing as a bare minimum a forum for diplomatic interaction of government representatives.

3. THE APPARENT STRENGTHENING OF INSTITUTIONS

The legacy of the League and its perceived deficiencies can be seen in the institutional structures of the UN. The Council of the League was replaced with the Security Council, and the Assembly with the General Assembly, minor name changes in a way, but disguising fundamental changes in hierarchy, voting rules and powers. Thus the League's influence on the UN is at the same time clear and yet also limited.

The Covenant provided the beginnings of a public order for states in its sparse provisions, while the Charter provided a much more detailed constitutional-institutional blueprint for a peaceful world. The Covenant placed obligations on member states in a cooperative model based on sovereign equality, and while the Charter also does this, it goes so much further in centralising enforcement powers to impose sanctions and take military measures in the Security Council.

¹ HENIG, R., *The League of Nations*, London, Haus Publishing, 2010, p. 38.

² MACMILLAN, M., *Peacemakers: Six Months that Changed the World*, London, John Murray, 2002, p. 17.

At the San Francisco conference in 1945, President Harry S. Truman echoed the words of Woodrow Wilson and credited him with laying the path that eventually led to the UN. President Harry S. Truman spoke about the «continuity of history» with the Charter representing the realisation of the vision of Presidents Woodrow Wilson and Franklin D. Roosevelt. He also spoke of the Charter as a constitution («a charter for peace») with comparisons made to the constitution of the United States: «This charter, like our own Constitution, will be expanded and improved as time goes on»³.

There was very little, if any, centralisation of enforcement in the League, but a close scrutiny of Chapters V, VI, VII and VIII of the UN Charter as well as the purposes and principles in Articles 1 and 2, shows the Security Council has the potential to override the rules of international law when it deems it necessary for peace and security. Whether it is the prohibition on the use of force, the principle of non-intervention, the autonomy of self-defence or of regional organisations - the Security Council is an exception to all of these when wielding its powers under Chapter VII, moreover with the power to override competing treaty obligations. This is not so much as power prevailing over law, rather power being given the trappings of legality.

James Brierly's critique of the sanctioning power of both organisations illustrates the point that the centralisation of such power in the Security Council does not necessarily result in a more effective organisation. Article 16 of the Covenant defined the event upon which sanctions were to become applicable, namely «resort to war by a member state in disregard of its covenants, triggering obligations which then fall due from the other members»⁴. Each member of the League had to decide for themselves whether the event had happened and the obligation was due. Such a system led to varying responses from members of the League, but it did allow for sanctions to be imposed by members when, under the UN system a veto by one permanent member blocks collective measures. In the UN system this has increasingly led to states taking unilateral non-forcible measures outside the UN system. While the triggers for sanctions under the Covenant are relatively precisely defined, they are opaque under the Charter (especially the trigger of «threat to the peace» in Article 39), which does little to ensure that the Security Council will make a determination or that its determination is «just».

James Brierly's incisive critique was contrary to the orthodox view that viewed the unanimity requirement for League decisions as the major impediment to its success. James Brierly considers that the requirement that League decisions must be made unanimously in Article 5 was not a major cause of disruption because the obligations were imposed on individual members and did not normally require decisions of the League's organs to activate

³ SCHLESINGER, S. C., *Act of Creation: The Founding of the United Nations*, Colorado, Westview Press, 2003, pp. 289-294.

⁴ BRIERLY, J. L., «The Covenant and the Charter», *British Yearbook of International Law*, vol. 23 (1946), pp. 83 at 87.

them⁵. In contrast, the UN Charter requires Security Council decisions to be made in order to trigger members' obligations. When this is combined with the veto it is clear that UN action can never be taken against a permanent member; when any major threat to world peace will come from the aggressions of Great Powers.

However, Article 16(2) of the Covenant appeared to represent a move from a decentralised system of sanctions to a degree of centralisation for military measures by declaring that it shall be the duty of the Council «to recommend to the several Governments concerned what effective military, naval or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League». This appeared to prevent military action being taken against an aggressor because of the unanimity requirements of Article 5 of the Covenant. However, Article 16(4) provided an avenue to military action by stating that any member of the League that had «violated any covenant of the League may be declared to be no longer a Member of the League by a vote of the Council concurred in by the representatives of all the other Members of the League represented thereon». This was in addition to provisions in Article 15 of the Covenant that the vote of any party to a dispute was not to be counted for the purpose of unanimity.

Thus, an aggressive state, including a Great Power, did not have a veto over any measures proposed against it in the design of the Covenant. This meant that forcible enforcement action could be *recommended* against a Great Power by the League Council, while in the Security Council a veto of a Great Power could block any proposed *decision*. Thus, although the institutional powers of the UN Security Council seem greater than its predecessor, the UN system does not provide for any action against the permanent members, while the Covenant potentially did. In other words while in practice the League appeared deficient, the design of the Covenant was as not flawed as commonly portrayed. The League's lack of action was due to its failure to achieve universality and the unwillingness of those states that were members to accept their obligations under the Covenant. The shift to a seemingly powerful centralised organ in the UN Security Council has proved to be a false legacy.

Under the Covenant an aggressor could not be a judge in their own cause. Under the Charter, in contrast, Article 27 only prohibits a permanent member that is a party to a dispute from vetoing resolutions proposed under Chapter VI. This signifies that under the UN Charter a permanent member can be a judge in their own cause when voting on resolutions proposed under Chapter VII. In reality permanent members have extended their practice to vetoing resolutions proposed under Chapter VI by arguing in various, often unconvincing, ways that they are not parties to the dispute in question.

The counterfactual that the UN has had more practice of imposing sanctions and undertaking military action than the League can be explained not

⁵ *Ibid.*, p. 88.

only by the fact that the UN has lasted much longer, but also by the fact that such operations have not been taken against the permanent members. In any case, UN practice on military measures is more akin to the voluntary one envisaged by the Covenant than the centralised system of military sanctions envisaged by Chapter VII of the UN Charter. The pretensions towards centralisation in the UN system have only been partially fulfilled in the form of improvised peacekeeping forces.

4. ADDRESSING THE PAST NOT THE FUTURE

It was not the case that the League embodied peace through law and the UN peace through power; both organisations encapsulated the power structures of the day. However, it was true that the drafters of the Covenant held the belief that the legal procedures contained therein would prevent the world stumbling into another conflict of the type started in 1914. The British Prime Minister David Lloyd George was of the view that had the League organisation existed in the summer of 1914 war would not have broken out as Germany would automatically have been called to account before the permanent machinery of the League⁶. The processes of delaying resort to war, the provisions for conciliation, arbitration or reference to the Permanent Court of International Justice, as well as the guarantee against aggression, would have led to a cooling-off period in which statesmen would have resolved their differences. There was recognition, however, that this procedural approach would not stop a government set on a long-term policy of aggression, and, therefore, would prove not to be robust enough for the sort of ideologically driven aggression that started the Second World War.

Just as the drafters of the Covenant looked to 1914 for inspiration, so the drafters of the Charter based their thinking on the war that was coming to an end in 1945. The UN was premised on the need to confront the sort of ideological aggression seen in 1939 by a continuation of the United Nations, formed in 1942 to prosecute war through executive action. This led to the embodiment of the executive in the Charter, but such thinking also ensured that its composition reflected the Second World War, not any potential Third World War, which is more likely to be sparked by an imploding failed state, or a use of nuclear weapons, accidental or otherwise.

Woodrow Wilson argued strongly for «Peace without Victory» in 1918⁷, and eventually an armistice was agreed with Germany. Germany was defeated but not vanquished. In contrast to the UN, the League «could not be formed during the war since that would make it into an instrument of the victors»⁸. The first draft of the Covenant was put together in a matter of a

⁶ HENIG, above note 1, p. 43.

⁷ TOOZE, A., *The Deluge: The Great War and the Remaking of Global Order*, New York, Penguin, 2015, p. 54.

⁸ *Ibid.*, p. 223.

fortnight by the League of Nations Commission in February 1919, after the war had ended. In contrast, the UN was formed in a nascent way in 1942 and formalised in 1945 within sight of completely vanquishing Germany and Japan, with the «enemy states» receiving particular attention in various provisions of the Charter.

The desire for an organisation capable of action was shown in the drafting of the UN Charter. At San Francisco, the Soviet delegate stated that one of the characteristics of the Security Council «was that actions should be fast and effective», pointing to the disastrous «effects of the suddenness of enemy action during the present war»⁹. This injection of supranationality into the Charter was presented as liberal institutionalist «progress», a further development that can be traced back through the League to the Concert of Europe¹⁰. In a more pragmatic vein, during the San Francisco conference the *New York Times* observed on 7 May 1945 that the smaller countries, many of which were devastated by war and concerned with simple survival, «reluctantly accepted the idea of virtual world dictatorship by the great powers» in return for having a «world organization», in which they would have some standing. Smaller states had no choice but to accept this new order. Importantly, they secured formal recognition of sovereign equality and a seat in the plenary body, which proved to be more than just a town hall meeting for the world.

It became very clear by the late 1940s that the dictatorship was a dysfunctional one that would not channel regular (but still inconsistent) collective action until 1990, but at the same time its permanent members shaped the world in their image. The Security Council was deadlocked, but its permanent members dominated the security landscape in particular through collective defence pacts, interventions and counter-interventions around the world, and the legalisation of the doctrine of nuclear deterrence, or «Mutually Assured Destruction», in the Nuclear Non-Proliferation Treaty of 1968.

Overall, the legacies of the League were mixed - some positive in the shape of the importance of universality, others negative in the sense of believing that greater centralisation would be the cure for the League when what was needed was probably a greater sense of obligation and commitment on the part of member states. The permanent members of the UN, in particular, have seen the veto and the powers of the Security Council as discretionary - a matter of choice, not obligation.

5. THE CONTINUITY OF THE INTERNATIONAL LEGAL ORDER

However, neither the Covenant nor the Charter represented clean breaks in the international legal order - they added a layer of international public

⁹ 2nd meeting of Committee III/1 (UNCIO Doc. 130, III/1/3), p. 2.

¹⁰ GOODRICH, L. M., «From League of Nations to United Nations», *International Organization*, vol. 1 (1947), pp. 3 at 5.

law on top of existing international customs and treaties¹¹. Once created, both organisations contributed to the development of the international legal order. The end of the League did not mark the end of legal regimes it had helped to create governing slavery, practices similar to slavery, trafficking, the protection of children, working conditions, health, radio communications and many others - these were all continued and further developed in terms of normative content and compliance by the UN.

Moreover, the UN Charter did not represent a complete break in the international legal order. The Covenant did not represent the constitution of the old order and the Charter that of the new. Indeed, one might speculate that an argument against the Charter being the constitution of the post-1945 legal order is that the international legal order would survive the demise of the UN, just as it survived the demise of the League. Thus, there was no break in the international legal order in 1919 or in 1945, a continuity embodied in some ways by the unchanging nature of the International Court—from the PCIJ to the ICJ—with a continuation in the rule of recognition of the international legal order in the list of sources found in Article 38 of the Statute of the ICJ (which faithfully reproduced Article 38 of the Statute of the PCIJ).

The supercharging of the normal methods of lawmaking by a universal international organisation is perhaps the greatest legacy of the League of Nations. This like any legacy has both negative and positive aspects. The preservation of empires in the League system was due to the British and French governments' views prevailing over attempted changes wrought by Wilson's Fourteen Points. King George V expressed his concern in 1917 that there was «too much democracy in the air»¹², but he need not have worried too much at least until the Thomas Franck made the argument for a right to democracy in the 1990s¹³.

The UN Charter did little to end empires¹⁴; they came to inevitable end in the early decades of the organisation and the new majority took little time in sounding their death knell in the 1960 Declaration of Decolonisation adopted by the General Assembly¹⁵, the basis of the development of the right and principle of self-determination. It has been through this type of momentous law-making resolution that the UN has truly continued the legacy of the League of Nations.

Keywords: League of Nations, United Nations, Covenant, Charter.

¹¹ McNAIR, A. D., «The Functions and Different Legal Character of Treaties», *British Yearbook of International Law*, vol. 11 (1930), pp. 100 at 112.

¹² TOOZE, above note 7, p. 74.

¹³ FRANCK, T. M., «The Emerging Right to Democratic Governance», *American Journal of International Law*, vol. 86 (1992), p. 46.

¹⁴ MAZOWER, M., *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations*, Princeton, Princeton University Press, 2009, p. 27.

¹⁵ UN Doc. A/RES/1514 (1960).